

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF MINNEAPOLIS

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| City of Minneapolis, Petitioner, v. Michael Roberts, Respondent. | FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION |
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The above matter came on for hearing before Administrative Law Judge Manuel J. Cervantes on August 13, 2008 commencing at 9:30 a.m. at the Office of Administrative Hearings, 600 Robert Street North, St Paul, MN 55164-0620. Trina Chernos, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402-2453 appeared on behalf of the City of Minneapolis (City). Respondent did not appear. On August 21, 2008, the Administrative Law Judge received the City's Notice of Motion and Motion for Default and affidavits in support of the Motion. The hearing record closed on September 5, 2008.

STATEMENT OF THE ISSUE

The issue in this proceeding is whether or not the City of Minneapolis properly declined to defend or indemnify the Respondent, a Minneapolis Police Officer, under Minn. Stat. § 466.07 and Article 26 of the Labor Agreement between the Peace Officers' Federation of Minneapolis and the City of Minneapolis, on the grounds that the off duty incident that occurred on July 11, 2006 involving an altercation was not within the performance of his duties. Alternatively, if the July 11 incident was within the performance of Respondent's duties as a Minneapolis Police Officer, was he guilty of malfeasance, willful neglect, or bad faith.

Based on the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On July 9, 2008, a Notice and Order for Hearing was mailed to the Respondent at his last known address.¹ The Notice scheduled a hearing for August 13, 2008.²

¹ Exhibit A contains a discrepancy. It is signed and dated **June** 9, 2008 by the notary but the body of the Affidavit above says the Notice and Order for Hearing was served on **July** 9, 2008. The OAH received its copy of the Notice and Order for Hearing dated July 9, 2008 on July 14, 2008.

2. The Notice and Order for Hearing notifies the Respondent that his failure to appear at the hearing may result in a finding that he is in default, that the allegations contained in the Notice and Order for Hearing may be accepted as true, and that any action proposed by the City may be upheld.

3. On August 11, 2008, Respondent confirmed in a telephone conversation with the Assistant City Attorney that he had received the Notice and Order and intended to appear at the Hearing scheduled for 9:30 a.m. on August 13.³

4. At approximately one hour before the scheduled hearing on August 13, 2008, Respondent notified the Assistant City Attorney by telephone message that he would not be in attendance on August 13.⁴

5. Respondent did not appear on August 13, 2008 nor did he request a continuance, or other relief, from the Administrative Law Judge.

6. The allegations as set forth in the Notice of and Order for Hearing are accepted as follows:

- a) The City of Minneapolis was served with a Summons and Complaint in the matter of *Randy Philip Rau v. Michael David Roberts and City of Minneapolis* on May 19, 2008;
- b) The lawsuit references an incident involving Michael Roberts on July 11, 2006, at a gasoline station owned by Plaintiff Randy Rau;
- c) Michael Roberts is a Minneapolis Police Officer;
- d) On July 11, 2006, Mr. Roberts and his wife arrived at a gas station owned by Randy Rau. Mr. Roberts was off duty but wearing a Minneapolis Police Department uniform. Mr. Roberts was in uniform because he had just finished working a "buy back" extension of his day shift. Mr. Roberts and his wife were in their personal vehicle;
- e) The couple prepaid for their gasoline, but a dispute arose as to whether the gasoline was dispensed into the Roberts' gas tank;
- f) A verbal altercation between Mr. Rau and Mr. Roberts ensued. In his civil lawsuit, Mr. Rau alleged that Mr. Roberts pushed him and struck him; and
- g) Brooklyn Center Police cited Mr. Rau for disorderly conduct and Mr. Roberts for misdemeanor assault.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

² Notice and Oder for Hearing.

³ See Affidavit of Trina Chernos, Assistant City Attorney, dated August 19, 2008.

⁴ See Chernos Affidavit.

CONCLUSIONS

1. The Administrative Law Judge and the City have jurisdiction pursuant to Minn. Stat. §§ 14.55, 466.07, and Article 26 of the Labor Agreement between the City of Minneapolis and the Police Officer's Federation of Minneapolis.

2. The Respondent was given notice of the Hearing in this matter and the City has complied with all relevant procedural requirements.

3. Under Minn. R. 1400.6000, the Respondent is in default as a result of his failure to appear at the scheduled Hearing.

4. Under Minn. R. 1400.6000, when a party defaults, the allegations and issues set out in the Notice and Order for Hearing may be taken as true and deemed proven. In this matter, the Administrative Law Judge takes those allegations and issues as true and they are deemed proven.

5. Article 26 of the Labor Agreement between the City of Minneapolis and the Police Officer's Federation of Minneapolis states, in pertinent part, as follows:

Section 26.1 – Legal Counsel. The City shall provide legal counsel to defend any employee against any action or claim for damages, including punitive damages, subject to limitations set forth in *Minnesota Statutes* §466.07, based on allegations related to any arrest or other act or omission by the employee provided: the employee was acting in the performance of the duties of his or her position; and was not guilty of malfeasance in office, willful neglect of duty or bad faith.

6. Minn. Stat. § 466.07 specifies that subject to certain limitations set forth in section 466.04,

[A] municipality or an instrumentality of a municipality shall defend and indemnify any of its officers and employees, whether elective or appointive, for damages, including punitive damages, claimed or levied against the officer or employee, provided that the officer or employee: (1) was acting in the performance of the duties of the position; and (2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

7. Under Minn. Stat. § 466.07, the City has the burden of proof to establish by a preponderance of the evidence that the Respondent is not entitled to defense and indemnification.

8. The City has demonstrated by a preponderance of the evidence that its decision not to defend or indemnify the Respondent was proper.

9. The conduct of Michael Roberts on July 11, 2006 did not occur in the performance of his duties as a Minneapolis Police Officer.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Minneapolis City Council AFFIRM its decision not to defend or indemnify the Respondent, Michael Roberts, in connection with *Randy Philip Rau v. Michael Roberts and City of Minneapolis*.

Dated: September 18, 2008.

s/Manuel J. Cervantes

MANUEL J. CERVANTES

Administrative Law Judge

Reported: Default

NOTICE

This report is a recommendation, not a final decision. The Minneapolis City Council will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. The parties should contact the City Clerk, Council Information Division, 350 South Fifth Street, Room 304, Minneapolis, MN 55415-1382, telephone (612) 673-3136, to learn when the City Council will consider this matter and whether the Respondent will have an opportunity to present argument to the City Council concerning this recommended decision.

The City is requested to serve its final decision upon each party and Administrative Law Judge by first class mail or as otherwise provided by law.